

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

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H. THOMAS CADELL, *Of Counsel*

August 14, 2002

Kenneth D. Sulzer
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2029 Century Plaza East, Suite 3300
Los Angeles, CA 90067-3063

Re: **Professional Status of Physical Therapists, Occupational Therapists and Physicians Assistants**

Dear Mr. Sulzer:

Anne Stevason, Chief Counsel of the Division, has asked me to respond on behalf of the Division of Labor Standards Enforcement to your letter regarding the above-entitled subject.

Your 17-page letter requests an opinion on whether Physical Therapists, Occupational Therapists and Physician Assistants employed by Kaiser Permanente Medical Care Program meet the test for a learned professional employee as set forth in Wage Orders 4 and 5, Section 1(A)(3)(a) and (b).

Your letter outlines the educational and licensing requirements of the three categories of workers which your client, Kaiser-Permanente demands and outlines the job duties they might be called upon to perform. In order to be considered for employment by Kaiser, physical therapists must be licensed to practice by the State of California and must possess a baccalaureate, master's, or doctor's degree. These requirements are found in a "Job Posting for Physical Therapist dated July 14, 2001¹."

Occupational therapists, according to your letter, must also be licensed and be a "graduate of an accredited occupational therapy curriculum with a Baccalaureate, Master's, or Doctoral degree." You note that the American Occupational Therapy Association states that occupational therapists "are skilled professionals whose education includes the study of human growth and development

¹This "Job Posting" sets out the qualifications needed to be considered for future employment and does not, of course, reflect the educational level of those employees who are currently employed in these positions.

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with specific emphasis on the social, emotional and physiological effects of illness and injury."

Physicians assistants, according to your letter, must meet the requirements of the Business and Professions Code, Section 3519².

In your letter, you state that "historically, federal law has consistently considered these categories of employees as professional employees." However, aside from NLRB decisions on the status of the occupational and physical therapists, you provide no evidence to support that statement. In addition, the test of whether an employee is a "professional" for the purpose of determining the contours of an appropriate bargaining unit under the NLRA is not the same as the test for determining whether an employee meets the professional exemption from overtime under the FLSA, or, as here, under state wage and hour law.

As you know, DLSE has historically and consistently taken the position that in order to qualify for the "learned" professional exemption, the employee must have an advanced degree. This position was based, originally³, on the language contained in 29 CFR 541.301(e) which states:

"The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced degree is a standard (if not universal) prerequisite.

An "advanced degree" is commonly defined as a degree above a

²We note that the regulations adopted by the Physician Assistant Examining Committee of the Medical Board of California found at 16 CCR § 1399.501 requires that "[A]ll instruction in the basic education core shall be at the junior college level or its equivalent with the exception of chemistry which may be at the junior college or high school level."

³As stated in Opinion Letter 1992.07.06: "As the federal regulations make clear, 'the 'learned' professions are defined as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.'" (Emphasis added). In that letter, DLSE concluded that a clinical psychologist was exempt since the occupational license demanded that the individual have at least a master's degree.

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baccalaureate degree⁴. Consequently, to the extent that the Sixth Circuit Court of Appeals has concluded otherwise, that decision does not represent the enforcement policy of the DLSE nor, we believe, does it represent the meaning of the term used by the California IWC. We might add that the analysis used by the majority in the case you cite (*Rutlin v. Prime Succession, Inc., et al.*, 220 F.3d 737 (6th cir.2000)), has been criticized by a number of courts. The DLSE position is more akin to that described by the dissenting opinion except, of course, that the California rule requires that the educational requirement be of an "advanced" nature using the commonly utilized definition of that term in this state. (See discussion at footnote 4)

In your letter you acknowledge that the DLSE has interpreted the learned professional exemption in a manner inconsistent with the cited federal regulations in the past; but, you state "it is now clear that the agency must now look to federal law for the construction of the learned professional exemption". We believe that this is incorrect.

In the Statement As To The Basis for the new wage orders, the IWC stated:

"After digesting all the information received in its review, the IWC chose to adopt regulations for Wage Orders 1-13, and 15 that substantially conform to current guidelines in the enforcement of IWC Orders, whereby certain Fair Labor Standards Act regulations (title 29 C.F.R. Part 541) have been used, or where they have been adapted to eliminate provisions that are inconsistent with the more protective provisions of California law."

Clearly, the IWC did not intend that the DLSE was to change the enforcement position adopted by the Division when the IWC first added the "learned professional" exemption in 1989. The position stated in this letter is the same as the enforcement policy announced by the DLSE shortly after the "learned" professional category was added to the IWC Orders. (See O.L. 1992.07.06)

⁴We rely on the interpretation of the term which the California Legislature has bestowed. For instance, in defining the category of "paralegal" at Business and Professions Code § 6450(c)(3), the statute requires that the applicant have a "A baccalaureate degree or an advanced degree in any subject..." Clearly, the California Legislature recognizes the difference between a "baccalaureate" and an "advanced degree".

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Unlike the clinical psychologists category addressed in the opinion letter 1992.07.06, there is no common educational requirement for licensure of physical therapists, occupational therapists, and physician assistants. The fact that the individuals must be licensed by the State of California is not determinative.

We would direct your attention to a relevant United States Department of Labor Opinion Letter (1998 WL 852713, dated February 19, 1998) which held that:

"Work that can be performed by an employee with education and training which is less than that required for a bachelor's degree would not be work of a bona fide professional level within the meaning of the Regulations. It is, therefore, our opinion that the medical assistant would not qualify as a bona fide professional employee, as discussed in section 541.3, since the primary duty does not consist of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as required by the Regulations."

We note that the Opinion Letter from the U.S. DOL dated May 10, 1974, which you cite fairly describes the duties of a nurse. As you know, the federal regulations specifically include nurses in the professional category - and the California IWC has historically refused to exempt nurses. We would further point out that the DOL letter requires that the "physician assistant have at least three years of academic study plus not less than one year of professional course work in a medical school or hospital." Clearly, this is not the same criteria as that required by the California regulations for a physician assistant (See 16 CCR § 1399.501). In addition, the nomenclature of physician assistant is not what is at issue. It is the educational and the duties criteria which are determinative.

This Division will make no definitive ruling on the question of whether all physical therapists, occupational therapists and physician assistants are exempt or non-exempt. The determination involves a fact intensive inquiry, which must be done on a case by case basis, applying the analysis set forth herein.

Yours truly,

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Kenneth D. Sulzer, Esq.
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